Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of Frequencies in the 2.1 and 2.5 GHz Bands	))))	PR Docket No. 92-80 RM 7909

COMMENTS OF THE
FEDERAL COMMUNICATIONS BAR ASSOCIATION

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TABLE OF CONTENTS

SUMMARY

The Association applauds the Commission's efforts to speed-up the processing of MDS applications and reduce the substantial backlog. It urges the Commission, however, not to scrap the present rules which require stations to be located on the basis of interference-free operation in favor of a mileage separation standard. The separation standard will not solve the processing problems nor serve the public interest because: (1) it will impose major burdens on applicants and create inequities; (2) it will create problems vis a vis ITFS stations which are frequently used in common with MDS stations but will continue to be located on an interference-free basis; (3) the inflexibility of the separation standards will make it difficult to serve nearby communities; and (4) it will likely generate a large number of waiver requests.

The Association believes that there are other ways in which the processing of MDS applications could be facilitated without the adverse impact of applying separation standards. Among them are: (1) the establishment of a current and complete data base; (2) employing a system designed to keep the data base current; (3) establishing policies that minimize the need for Commission staff to seek additional information or application amendments; and (4) modifying the application form and eliminating or reducing application requirements that are of marginal value.

Relative to the regulatory responsibility for MDS, the Association urges the Commission to give serious consideration to placing primary responsibility for both MDS and ITFS in the same bureau because these services share the same band and are often jointly used to provide both educational and wireless cable services. The Mass Media Bureau would appear to be the most logical choice since that Bureau has staff experienced in processing similar applications and the desirability of having responsibility for both wired cable services and wireless cable services in the same bureau given the fact that they are competitors. However, it is recommended that the Commission assign the responsibility for initial processing of these applications (e.g., the initial data entry and public notices) to the Private Radio Bureau staff in Gettysburg in view of its past successes in efficiently processing large quantities of applications.

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The Federal Communications Bar Association (FCBA or Association) hereby files its comments in the captioned proceeding in response to the Commission's Notice of Proposed Rule Making, released May 8, 1992, in the above captioned matter (the Notice), stating as follows:[1]

INTRODUCTION

The Commission's Notice concerns the rules and policies that govern the processing of applications and licensing of stations in the Multipoint Distribution Service (MDS). These stations are used primarily, often in conjunction with the excess air-time use of stations in the Instructional Television Fixed Service (ITFS), to provide what is typically referred to as wireless cable television service, a relatively new service that provides an "over the air" alternative to traditional cable television service. Over the last several years the Commission has adjusted its rules and policies in

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[1] FCC lawyers are members of the Association and serve on various committees and the Executive Committee. None of these members participated in the preparation of these comments or their consideration by the Executive Committee.

an attempt to enhance the viability of wireless cable as a potential competitor to cable service.[2]

In the Notice the Commission recognizes that despite these efforts the competitive potential of wireless cable remains largely unrealized. It identifies a reduction of the backlog of approximately 20,000 pending MDS applications, some dating back as far as 1980, as a critical step in promoting the viability of the wireless cable industry. Accordingly, the Notice proposes substantial changes in the method for processing and considering MDS applications. Among other things, the Commission proposes the possible reassignment of responsibility for the service to a different staff and replacement of the current system of frequency interference standards with a system of mileage separation. The Commission believes that such a system will greatly simplify processing and, along with a number of other procedural changes, will allow it to more rapidly process and dispose of the hugh backlog of pending applications.

Members of the FCBA, many of whom practice before the Commission representing clients filing MDS and ITFS applications, have a strong interest in the rules and policies affecting the

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[2] See, e.g., Report and Order in CC Docket No. 86-179, 63 RR2d 398 (1987), (MDS licensees permitted to operate as non-common carriers); Report and Order in Gen. Docket Nos. 90-54 and 80-113, 68 RR2d 429 (1990), (removing ownership restrictions on MMDS licensees to permit ownership and use of multiple channels to enhance competitive posture vis a vis wired cable systems); Order on Reconsideration, 69 RR2d 1477 (1991), (providing interference protection to ITFS channels leased for wireless cable use and revising ITFS excess capacity leasing rules); and Second Report and Order, 69 RR2d 1499 (1991), (H channels reallocated to MDS to enhance competitive potential).

processing of these applications. The FCBA applauds the Commission's interest in resolving these processing problems and in facilitating the efforts of entities attempting to establish wireless cable systems, the most crucial aspect of which is acquisition of enough frequency channels for a commercially viable system. Accordingly, the Association offers these comments, which focus primarily on issues of a procedural nature, in a constructive spirit with the goal of assisting the Commission in establishing rules and policies designed to greatly facilitate the processing and consideration of these applications.

COMMENTS

1. Adoption of Separation Standards Will Not Solve The Processing Problems.

The Notice raises the question of whether it would facilitate processing to replace the current interference protection standards in Section 21.902 of the rules with a mileage separation standard. It recognizes that the advantage of the interference standards is the high degree of flexibility it affords in locating and designing systems but at the disadvantage of slowing the processing of applications. It suggests that replacing the interference standards with mileage separation requirements of 80 km for co-channel operation and 48 km for adjacent channels, adjusted somewhat to reflect the comparative heights above average terrain (HAAT), will greatly simplify the process and expedite the processing of applications. It proposes detailed rules on how such a standard could be implemented in the face of the large backlog of pending applications engineered to accommodate the existing interference

standards of 45 dB for co-channel operation and 0 dB for adjacent channels.

The Association opposes the substitution of the mileage separation standard for interference standards for several reasons. First, as the Notice has recognized, the proposed scheme would require applicants to come forward to amend their pending applications to show compliance with the new standards. The Notice does not recognize that such filings would not only pose a major burden on applicants and create potentially significant inequities among pending applicants but would also doubtless generate numerous petitions or requests for exceptions or waivers. Obviously, such an influx of filings and waiver requests would result in a major burden on the Commission staff, the magnitude of which could well outweigh the benefits of what was intended to be a more simplified process.

Second, given the fact that most wireless systems depend upon the part-time use of ITFS facilities, which are authorized on an interference standard comparable to that currently employed for MDS, it seems incongruous to apply a different standard to MDS. Such a dichotomy of policies would allow some wireless operators to serve communities through the lease of ITFS facilities but deny them the ability to seek use of MDS facilities because other MDS facilities, either authorized or previously proposed, are or could be within the proscribed mileage zones. By impairing the ability to co-locate MDS and ITFS facilities in many markets, such a policy could inhibit the use of ITFS frequencies to the disadvantage of both the educational communities and potential wireless cable subscribers.

Third, as the Commission has acknowledged, the use of a mileage separation standard would come at the expense of the flexibility that current standards provide in allowing facilities to be engineered to be in closer proximity to one another. Without such flexibility communities in relatively close proximity, e.g., Washington-Baltimore, Dallas-Ft. Worth and Boston-Providence, could not both be served. Further, existing operators would not be able to establish subsidiary facilities to serve nearby communities that have no line of sight because of terrain blockage.

Fourth, the separation standards would create problems for wireless cable operators with less than all available MDS channels authorized and tend to encourage a substantial number of waivers from those entities. As the Commission is aware, there are numerous MDS stations authorized and in operation. These stations were engineered and authorized based on the 45 dB, 0 dB interference standard. In many cases not all of the available MDS frequencies[3] have been authorized. If the Commission were to apply a different standard to the unauthorized channels, it would in many cases make it impossible to fill out the full channel complement in such communities without extensive resort to waivers.

Thus, even if it were assumed that the separation standard would result in a significant reduction in the processing time of applications, the Commission should consider whether such a savings would outweigh the public interest cost in terms of communities that

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[3] Currently allocated are two single channels, MDS channels 1 and 2 or 2A, and the 11 multichannels in the E, F and H groups.

could not be served under a mileage separation standard and whether the long term interest in supporting the viability of wireless cable is not better served by the greater flexibility afforded by the current standards. For these reasons the Association urges the Commission not to adopt the mileage separation system in lieu of the current system of interference standards.

2. Alternative Ways of Facilitating Application Processing.

Retention of interference standards does not mean that the Commission cannot and should not make changes to facilitate and speed-up the processing of MDS applications. While these less radical alternatives might require a more substantial investment in resources up-front, over the long run they should yield substantially improved processing efficiency without the adverse effects inherent in the separation standards as discussed above. Among others, the improvements discussed below would yield substantial results, not only in terms of improved FCC staff processing efficiency and speed but in reducing the burden on the applicants as well.

a. Establishing A Current and Complete Data Base. One of the major problems encountered by both the Commission staff and the applicants is the lack of a complete and up-to-date data base. Currently, the Commission has received thousands of applications that are not included in any data base because they have never appeared on public notice as either tendered or accepted for filing.

The Commission has recognized this problem and instituted, as an interim measure, a freeze on the filing of applications for new

stations while it makes a concerted effort to enter pending applications into a data base through the use of staff at the Commission's Gettysburg offices. The Association supports this effort. However, it is critical that the data base be complete, not only in terms of applications being promptly logged in, but also in terms of the data base elements necessary to facilitate application processing, especially interference analysis.[4] This data base should include information not only on pending applications but all authorized facilities as well. Further, because numerous ITFS stations are adjacent to the E, F and H channel groups and a number are grandfathered on those frequencies, the ITFS data base should be made comparable to the MDS data base and include authorized receive site information as well.

After all data have been initially entered into the data base, it is recommended that it be published and all licensees and applicants given a limited period of time (say 60 days) to advise the Commission of any errors. Subsequently, the Commission should make a corrected data base available to the public so as to facilitate the filing of accurate and viable applications.

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[4] A data base complete enough to facilitate interference analysis should include all relevant information on the first page of the 494 application form, including: applicant name and address, date of filing, file number, station coordinates, frequencies, polarization, transmitter make and power, transmit antenna make and model number, antenna height above ground, ground level (AMSL), EIRP, antenna orientation (if a directional antenna is used), and beam tilt.

b. Maintaining a Current Data Base. As indicated above, a major problem has been the delay in getting applications into the data base and onto public notice promptly after filing. The Common Carrier Bureau staff has been so short handed that an application is typically not placed on public notice for a number of months after its filing. As noted above, this has resulted in the filing of many unnecessary applications because subsequent filers are unaware of previously filed applications that would preclude the later filings.

The interim solution of using the Gettysburg staff for getting these applications into the data base could be expanded into a permanent operation. That staff is geared to the processing of large quantities of relatively simple applications and could easily initially enter these applications into the data base and accept them for filing pursuant to standardized criteria.

c. Facilitating the Processing of Applications. Once a complete data base that can be easily kept current is in place, it is recommended that the Commission consider a procedure that would largely eliminate the need to seek additional information from applicants, which is understood to be a major impediment to rapid processing. Such a procedure could be as follows:

First, following the publication of the new data base, by public notice the Commission would give all applicants a specified period of time to amend their applications to update their interference showings and provide any other missing information that the Commission considers necessary for easy processing. After the deadline for filing such amendments, the Commission staff would

commence processing of applications, presumably in order of date filed. If an application is not complete in terms of the interference showing or other information the Commission has noted in the public notice as being necessary, the application could be dismissed. This would largely avoid the delay in seeking amendments during the course of processing. Further, the amount of time a staff engineer would have to spend in reviewing the interference showing would be minimized since the showing in the application could be compared with the Commission data base and a computerized program employed to check the interference calculations.[5]

As subsequently filed applications are processed, the Commission staff would be in a position, after consulting with the data base, to dismiss any applications that would be mutually exclusive with a previously granted application but filed after the cut-off date.[6] Such a system, together with changes in the application form as discussed below, would greatly facilitate and speed-up the processing of applications.

d. A Modified Application Form and Less Burdensome Rules. The Form 494 currently used by MDS applicants is a multiple purpose form that is used for all Part 21 applicants, including Point-to-Point Microwave Radio Service and Digital Electronic Message Service as well as MDS. As such, it is designed in a way that is not the

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[5] It would appear that the only calculations that could not be easily be checked by computer would be those based on terrain blockage.

[6] Applications that have mutually exclusive status with one another would, of course, have to be considered simultaneously.

easiest for either the input or extraction of data relative to the technical parameters of a proposed MDS facility and asks many questions that are not particularly applicable to MDS.[7] If a special form were designed for MDS, the application could be simplified and unnecessary questions eliminated, thus easing the burden on the applicant and facilitating processing by the Commission staff.

Further, the Commission should consider eliminating or modifying some of the current rules or policies that unnecessarily burden the filing and processing of applications. For example, the Commission staff has generally interpreted Section 21.15(a) of the rules to require a lease or lease option to prove site availability. Not only are such documents costly and time consuming for the applicant to acquire, this requirement complicates the processing of applications. Other Commission radio services do not impose such a burdensome requirement, and they are not known to have any greater problems in terms of subsequent modifications to change sites.[8] The Commission could delete this requirement with little negative impact. At minimum, it should employ a simple certification statement built into the application form.

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[7] Examples of questions that are irrelevant to MDS or of marginal usefulness relate to: geostationary satellite orbit, program input facilities, maintenance center, frequency coordination, Section 214 authorization, ownership and control of facilities, state or local franchises, subscriber affiliation, tariff and construction costs.

[8] For example, Parts 90 and 94 have no site availability requirements. The Form 301 used for broadcast services contains little more than a certification. Form 330 used for ITFS contains no site availability or certification requirements.

3. A Change In MDS Processing And Regulatory Responsibility

With respect to the processing responsibility for MDS applications, the Notice raises four possible options: (1) relocation "some or all aspects of the processing" to the Private Radio Bureau's Licensing Division in Gettysburg with either the Common Carrier Bureau's or the Mass Media Bureau's having regulatory responsibility; (2) having both processing and regulation performed by the Private Radio Bureau; (3) having both processing and regulation performed by the Mass Media Bureau; or (4) retain both processing and regulation in the Common Carrier Bureau.[9]

The Commission should recognize the fact that MDS and ITFS are in large measure extensively intertwined in terms of both frequency usage and practical application. They both share 2596-2644 MHz band, utilize the same type of facilities, and increasingly the channels allocated to ITFS are used jointly for providing both educational and wireless cable services. Indeed, without such joint use of the ITFS channels, it is unlikely that wireless cable would be economically possible in most markets. While the Commission over the past few years has attempted to make its rules and policies with respect to MDS and ITFS more compatible, there are still numerous dichotomies. Rules, policies, application forms and processing procedures of the two services bear little resemblance to one another, often without logical distinction.

Accordingly, in the FCBA's view the most critical policy decision is not so much which bureau or bureaus should have

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[9] Notice at paragraph 6.

responsibility for MDS. Rather, the Commission should first determine whether there are good policy reasons for combining primary responsibility for MDS in the same bureau that is responsible for ITFS. The Association believes that there are very convincing reasons for such consolidation. Placing responsibility for both MDS and ITFS in the same bureau would tend to result in the elimination of the multiplicity of policy and processing distinctions that have often led to inconsistent and often illogical treatment to the detriment of the early establishment of viable services.

Once that decision is made, the assignment of responsibilities between the bureaus becomes a relatively easy choice. Although both ITFS and MDS could be assigned to the Private Radio Bureau, a more logical home would seem to be the Mass Media Bureau for two primary reasons.[10] First, the Mass Media Bureau has staff experienced with ITFS is which technologically is almost identical to MDS and with the conduct of lotteries (for translator/low power TV applications) similar to those conducted for mutually exclusive MDS applicants. Second, wireless cable is a competitor to traditional wired cable service, which is regulated as a mass media service in that bureau. Given this factor, it would seem that the Commission could better coordinate its policies relative to these two ways of distributing

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[10] Given the fact that the vast majority of MDS licensees operate on a non-common carrier basis, there would seem to be no persuasive reason to retain Title III licensing in the Common Carrier Bureau. However, if some MDS licensees were to opt for continued common carrier status, there is no reason why Title II regulation of those entities could not be continued under existing rules administered by the Common Carrier Bureau.

multi-channel video services, particularly as wireless cable develops in the future and becomes a more viable competitor to traditional wired cable television.

If the Commission does allocate prime responsibility to the Mass Media Bureau, it would be logical, as recommended above, for the initial processing of applications (both MDS and ITFS) to be done in Gettysburg.[11] Such initial processing would probably consist of entering each application in the data base and placing the applications on public notice.[12]

If the Commission were to decide to assign complete responsibility to Private Radio, the FCBA strongly urges the Commission to assign the engineering and legal review of applications to a Washington based staff. These applications have traditionally raised numerous policy, legal and technical issues that require the attention of a skilled and knowledgeable staff. While the Private Radio Bureau staff in Gettysburg is certainly dedicated and productive, the Parts 90 and 94 applications that it has traditionally processed do not typically involve the complex issues that frequently occasion MDS/ITFS applications which require the attention of a substantial legal and engineering staff.

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[11] If the Commission were to assign MDS to the same branch that processes ITFS applications, the Association urges that steps be taken to ensure that the current processing times for ITFS applications are not substantially lengthened.

[12] This could either be on a one step basis such as now employed for MDS or the "tender" notice phase of the two step process now employed for ITFS.

Accordingly, whatever processing/regulatory assignment is made, the Association strongly urges the Commission to retain primary responsibility in a Washington based processing unit that is staffed with an adequate number of professionals and other processing disciplines. Further, assuming responsibility for MDS is transferred from the Common Carrier Bureau, the Commission is urged to make arrangements for the transfer of at least some of the Common Carrier Bureau MDS staff to the new processing unit so as to ensure a reasonable degree of continuity and to minimize the normal "learning curve."

CONCLUSION

Again the FCBA applauds the Commission's interest in improving the processing of these applications. It urges the Commission to seriously consider the foregoing comments and suggestions in reaching an early decision in resolving these issues.

Respectfully submitted,
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